Nos. 00-568 & 00-809

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IN THE

Supreme Court of the United States

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PEOPLE OF THE STATE OF NEW YORK AND THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

ENRON POWER MARKETING, INC.,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF ENRON POWER MARKETING, INC. AS PETITIONER IN NO. 00-809

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QUESTIONS PRESENTED IN NO. 00-809

Whether the Federal Energy Regulatory Commission (FERC) has jurisdiction under the Federal Power Act (FPA), 16 U.S.C. §§ 792 *et seq.*, to regulate all transmission of electric energy in interstate commerce, including interstate transmission of electric energy that is sold to retail customers at a "bundled" price.

Whether FERC had jurisdiction and the obligation under the FPA to eliminate pervasive "undue discrimination" in the provision of interstate electric energy transmission services by requiring transmission-owning utilities to provide interstate transmission services on the same terms to all users, for all interstate transmissions, including transmissions bundled with retail sales.

Whether the court of appeals erred in ruling that FERC had discretion to interpret the FPA as denying FERC the necessary jurisdiction to remedy the undue discrimination it had found in the provision of interstate transmission.

PARTIES TO THE PROCEEDING

The list of parties before the court of appeals is set forth at No. 00-809 Pet. App. 683a to 688a.

RULE 29.6 STATEMENT

Enron Corp. is the only publicly held company owning 10% or more of petitioner's stock. The following companies are the parent companies of petitioner:

Enron Corp.

Enron North America Corp.

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BRIEF OF ENRON POWER MARKETING, INC. AS PETITIONER IN NO. 00-809

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 225 F.3d 667 (D.C. Cir. 2000) and reprinted at No. 00-809 Pet. App. 3a to 121a. Federal Energy Regulatory Commission (FERC) Order No. 888 is reported at F.E.R.C. Stats. & Regs. ¶ 31,036, 61 Fed. Reg. 21,540 (1996). FERC's rehearing

decisions, Order No. 888-A and Order No. 888-B, are reported respectively at III F.E.R.C. Stats. & Regs. ¶ 31,048, 62 Fed. Reg. 12,274 (1997), and 81 F.E.R.C. ¶ 61,248, 62 Fed. Reg. 64,688 (1997). Relevant portions of FERC Orders Nos. 888 and 888-A and FERC's Notice of Proposed Rulemaking (NOPR), F.E.R.C. Stats. & Regs. ¶ 32,514, 60 Fed. Reg. 17,662 (1995), are reprinted at No. 00-809 Pet. App. 125a to 644a.

JURISDICTION

The court of appeals entered its judgment on June 30, 2000, and issued its order denying a timely filed petition for rehearing on August 22, 2000. On November 20, 2000, Enron Power Marketing, Inc. (Enron), filed a timely petition for a writ of certiorari pursuant to 28 U.S.C. § 2101(c) and S. Ct. R. 13. That petition, No. 00-809, was granted by the Court on February 26, 2001. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

Sections 201, 205, 206, 211, 212, 213, and 313 of the Federal Power Act (FPA), 16 U.S.C. §§ 824, 824d, 824e, 824j, 824k, 824*l* and 825*l*, are reprinted in the Appendix at No. 00-809 Pet. App. 652a to 681a.

Sections 1, 4, and 5 of the Natural Gas Act (NGA), 15 U.S.C. §§ 717, 717c, and 717d, are reprinted in the Appendix at No. 00-809 Pet. App. 645a to 651a.

Relevant portions of FERC Orders Nos. 888 and 888-A are reprinted in the Appendix at No. 00-809 Pet. App. 125a to 551a.

STATEMENT

This case concerns the authority and obligation of the Federal Energy Regulatory Commission (FERC) to remedy what FERC itself called "the single greatest impediment to competition" in the electric industry. NOPR at 33,049, Pet. App. 558a.[1] In the orders under review, FERC found that vertically integrated utilities that own and control major portions of the interstate transmission grids regularly discriminate against competing power suppliers, denying them equal access to the high voltage lines that carry electricity from generation facilities to local distribution facilities. To remedy this undue discrimination, as it is required to do by the Federal Power Act (FPA), FERC ordered all public utilities to publish an "open access transmission tariff" (OATT) and take transmission for their own *wholesale* sales and *un*bundled retail sales under the same terms as other users. But FERC determined that it lacked jurisdiction to apply this requirement to transmissions sold with generation and distribution at retail for a single "bundled" charge. FERC's failure to extend the OATT to such bundled retail transmissions leaves the undue discrimination unremedied in the market segment that accounts for about 60% of all pertinent interstate transmissions. The result is contrary to FERC's express obligations under the FPA and poses a serious threat to coherent regulation of the Nation's interstate transmission grids.

A. The Electric Industry

The electric industry depends on three kinds of facilities: generation facilities that produce electric energy; distribution

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[1] All citations in this brief to "Pet. App." are to the Petitioner's Appendix filed with Enron's Petition for a Writ of Certiorari in No. 00-809.

facilities that deliver electric energy to end users; and transmission facilities that carry electricity at high voltages from the generation facilities to the distribution facilities.[2] Today, the transmission facilities in every state (except Alaska, Hawaii, and part of Texas) interconnect into two large reticulated grids, the Eastern and Western Interconnections. *See* Steven M. Kramer & Bret A. Sumner, *Electric Reliability in North America: Cross-Border Implications*, 14 Nat. Resources & Env't 81, 82 (1999) (Kramer & Sumner); *see also* Order No. 888 at 31,781, Pet. App. 305a n.541.

The largest segments of the interstate grids in each state are owned by the vertically integrated public utilities that have traditionally provided electricity to their local customers (their "native loads") on a regulated monopoly basis. *See* Order No. 888 at 31,652, Pet. App. 172a. The utilities use these facilities for bulk transmissions of the electric energy that they sell either at wholesale (i.e., to entities that in turn resell) or at retail (i.e., to end users who receive electricity via the utilities' local distribution systems). Other power suppliers that compete against the vertically integrated utilities depend on the same facilities to carry electricity to their customers.

As an accounting and contractual matter, a utility's sales charges may be either "unbundled" or "bundled." That is, the utility may, by its own choice or pursuant to state law, either present separate charges for the electricity, the transmission service, and the delivery service, or it may "bundle" the costs associated with these separate services

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[2] Although the broad distinction between high voltage transmission facilities and low voltage distribution facilities is of long standing and generally understood, the exact line is a matter of definition. FERC supplied such a definition in Order No. 888 at 31,771, Pet. App. 282a-283a, and it is not at issue in this Court.

into a single line item charge.[3] At present, approximately 37% of pertinent retail sales were previously sold at wholesale, and almost 97% of all retail sales are made on a "bundled" basis.[4] Thus, the bundled retail sales that are the specific concern of No. 00-809 and this brief account for about 60% of the pertinent usage of the interstate grids.

These contractual and accounting arrangements, however, bear no resemblance to the physical behavior of electricity on the high voltage interstate grids. A quantity of electricity is not a discrete object that flows from a particular source to a particular buyer or user over a particular route, and a supplier generating electricity cannot prescribe the route over the grid that "its" electricity will follow.[5] Each

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[3] *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 394 (1999) (defining "unbundled" as "to give separate prices" for various components of the service rendered).

[4] In 1999, approximately 2.44 billion megawatt hours of electricity were sold at retail by FERC jurisdictional generators: 2.4 billion by investor-owned utilities (IOUs) plus 43 million by independent power producers (IPPs). *See* Energy Information Administration, United States Department of Energy (EIA), *Financial Statistics of Major U.S. Publicly Owned Electric Utilities 1999*, at 3 (2000); EIA, 2 *Electric Power Annual 1999*, at 87 (2000). At most, 915 million of these megawatt hours, or 37.5%, had previously been sold at wholesale. *Id.* (showing 545 million megawatt hours were available for resale by IOUs and 370 million megawatt hours were sold "to Utilities" by IPPs). About 76 million megawatt hours (3% of retail sales) were sold on an unbundled basis, with the remaining 97% sold on a bundled basis. *See* EIA, *Electric Sales and Revenue 1999*, at 3, 245, 255 (2000) (noting that total retail sales were generally made on a bundled basis, and showing transmissions of 76 million megawatt hours sold pursuant to "retail wheeling" programs, i.e., on an unbundled basis). In total, therefore, there are no wholesale or unbundled transmissions associated with almost 60% (1.45 billion of 2.44 billion megawatt hours) of all retail sales.

[5] Unlike, for example, a water supply system, no substance—only energy—flows through the grid, and its flow cannot be routed within the grid. *See Florida Power & Light Co.*, 37 F.P.C. 544, 546 (1967).

interconnection operates as a single pool of energy, into which generating facilities (wherever located) deposit electric energy, and from which customers (wherever located) draw it down.[6] Every connected use draws to some degree on every connected source and to some degree affects the state of the entire system. The frequency of electric energy in the grid is maintained at a standard level, generally 60 cycles per second (or a multiple thereof), by legal and physical arrangements affecting the entire grid and all sources and uses. *See Florida Power & Light Co.*, 37 F.P.C. 544, 548, 564-65 (1967). "[A] load change at any point will have an effect on the instantaneous generation and frequency at every point on the interconnected system." *Id.* at 565. A sudden surge of use in Boston, or a downed high voltage transmission line in New York, impacts electric operations in every state in the Eastern Interconnection. *See id.* at 548-50.

B. Statutory Background

In the early years of the Twentieth Century, in part because electricity could be produced in many places but could not be successfully transmitted over long distances without substantial losses, the electricity business was almost entirely local. *See Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 681 (D.C. Cir. 2000) (*TAPS*), Pet. App. 9a; Order No. 888 at 31,639, Pet. App. 141a. Vertically integrated utilities, mostly confined to single states, each generated, transmitted, and distributed their own electricity to

[6] In this respect, the electricity network is very different from, for example, the telephone network. When one telephone caller dials another, the switches in the telephone network establish a dedicated circuit between them that remains open for the length of the call, and all communications between the callers travel over this fixed open pathway. By contrast, when a generating utility contracts with an end user to deliver electricity, nothing travels on any path between them: the utility generates an additional amount of electric energy for the grid, and the end user withdraws a corresponding amount of electric energy from the grid.

their own customers, selling it to them on a bundled basis. "The industry consisted of independent, unassociated, local units [but] its piecemeal and planless development resulted in an uneconomic division of territory, wasteful overlapping of facilities, and lack of engineering and economic unity." Memorandum of Oswald Ryan, General Counsel of the Federal Power Commission (FPC), and Dozier A. DeVane, Solicitor of the FPC (Ryan-DeVane Memorandum), in *Public Utility Holding Company Act of 1935: Hearings on S. 1725 Before the Senate Comm. on Interstate Commerce*, 74th Cong. 797 (1935) (*Hearings on S. 1725*).[7] In 1935, only a "fraction of the nation's electric systems were interconnected in interstate networks." *Federal Power Act Amendments of 1967, Hearings on H.R. 5348, H.R. 5637, H.R. 7799, H.R. 8426, H.R. 8919, H.R. 9174 Before the Subcomm. On Communications and Power of the House Comm. on Interstate and Foreign Commerce*, 90th Cong. 4 (1967) (*1967 Hearings*) (statement of Lee C. White, Chairman, FPC). Gradually, however, the utilities found that interconnecting with other utilities enabled them to sell their power in other markets and draw on other generators' electricity to meet local demand, which allowed them to increase the reliability and profitability of their services.

Congress adopted the Federal Power Act to regulate this growing network arrangement. As originally enacted, the FPA took three steps pertinent to the present case. First, the FPA gave the Federal Power Commission (FERC's predecessor) jurisdiction over all "transmission of electric energy in interstate commerce" and all "facilities" used for such transmission. 16 U.S.C. § 824(b)(1). It defined "[e]lectric energy in interstate commerce" as energy "transmitted from a State and consumed at any point outside thereof." 16 U.S.C. § 824(c).

[7] The Ryan-DeVane Memorandum summarizes the history of the industry up to 1935.

Second, the FPA gave the FPC jurisdiction over "the sale of electric energy *at wholesale* in interstate commerce." *Id.* § 824(b) (emphasis added). The phrase "at wholesale" was applied to *sales* in order to provide a "bright line" between sales transactions subject to FPC jurisdiction and sales transactions regulated by the states.[8] The qualifier "at wholesale" was not applied to *transmissions* in interstate commerce, all of which were made subject to the Commission's jurisdiction. *See* Order No. 888 at 31,969, Pet. App. 338a ("statute . . . makes no distinction between wholesale transmission and retail transmission"); *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 636 (1972) (*LP&L*) (interpreting the parallel provision of the NGA, 15 U.S.C. §§ 717 *et seq.*).[9]

Third, the FPA commanded the FPC to remedy "undue discrimination." Specifically, section 205 of the FPA, 16 U.S.C. § 824d, bars any public utility, "with respect to any transmission or sale subject to the jurisdiction of the Commission," from "grant[ing] any undue preference or advantage to any person or subject[ing] any person to any

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[8] *See FPC v. Southern California Edison Co.*, 376 U.S. 205, 211 (1964). As the Court there explained, with respect to sales, Congress was responding to the Court's decision in *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), holding that the Commerce Clause barred states from regulating interstate wholesales. The wholesale/retail "bright line" served to distinguish jurisdictional from nonjurisdictional sales without case-by-case adjudication of Commerce Clause issues. There is no comparable distinction with respect to interstate transmissions, all of which are part of interstate commerce and have been subject to federal regulation since 1935. There is therefore no need for a bright line with respect to transmissions.

[9] All of the provisions of Part II of the FPA pertinent to this case are "in all material respects substantially identical" to parallel provisions of the NGA. *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981) (internal quotation omitted). This Court has an "established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes." *Id.*

undue prejudice or disadvantage," *id.*, and requires each utility to file tariffs setting forth its "practices," *id.* § 824d(c). Section 206(a), 16 U.S.C. § 824e(a), directs FERC, whenever it determines that a practice is "unjust, unreasonable, unduly discriminatory or preferential," to cure the discrimination: FERC "shall determine the just and reasonable . . . practice . . . to be thereafter observed and in force, and shall fix the same by order."

After the adoption of the FPA, two further developments, intertwined with changes in law, set the stage for the present case. First, the process of interconnection accelerated, spurred by ever-greater needs for more reliable electricity service and by technological developments that made it possible to transmit electricity at high voltages over long distances without unacceptable losses. *See* Order No. 888 at 31,641, Pet. App. 147a. By 1967, "[i]nterconnections, direct and indirect, among utilities [were] a far more vital part of the industry's operations." *See 1967 Hearings* at 118 (statement of Lee C. White, Chairman, FPC).[10] Commentators in 1967 accurately predicted that interconnections would become "still more vital in the future." *Id.* Today, all high voltage electric transmission lines (other than those in the two non-contiguous states and part of Texas) are connected into one or the other of the interstate grids. *See* Kramer & Sumner, *supra* at 82; Order No. 888 at 31,781, Pet. App. 305a n.541. The volume of transmissions subject to FERC's jurisdiction has thus increased many fold, not because of any change in the statute (or its interpretation) but because real-world changes in the physical structure of the electric industry have brought almost all transmission within the jurisdiction defined in 1935. These changes have "made [p]hysically isolated

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[10] *See Florida Power & Light*, 37 F.P.C. at 557 (Carver, Commissioner, dissenting) (noting that more than 90% of transmission facilities were by then interconnected).

systems . . . a thing of the past." Order No. 888 at 31,641, Pet. App. 147a.[11]

A second, closely related major development since 1935 has been the rise of competition among sources of electric energy. Spurred by the energy shortages of the 1970s, Congress adopted the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. §§ 2601 *et seq.* (PURPA), amending the FPA to encourage the construction and more efficient use of electric generation facilities. PURPA achieved this by requiring traditional utilities to buy power from industrial cogenerators and certain generators using renewable energy sources. *See* Order No. 888 at 31,642, Pet. App. 148a & n.36. These new suppliers began to compete with traditional utility generators. *See* 16 U.S.C. §§ 2601, 2611; Order No. 888 at 31,642, Pet. App. 147a-148a. This small step launched a transformation of the industry such that "[i]n 1992, for the first time, generating capacity added by independent producers exceeded capacity added by utilities." Order No. 888 at 31,643, Pet. App. 151a (citation omitted). Other competing sources also grew, including many traditional utilities that became marketers of electricity outside their "native" areas. *See id.* at 31,639, 31,641, Pet. App. 141a, 147a. Where the generation, transmission, and delivery of power were all once largely local activities, generation and marketing of power became the subjects of increasingly intense interstate competition. *See id.* at 31,635, 31,645-46, Pet. App. 131a-132a, 156a-157a.

To compete, however, these new sources of electric power needed to be able to deliver power from the generators to either wholesale customers or retail distribution points, which meant purchasing transmission services from their chief competitors, the traditional vertically integrated utilities

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[11] *See also Pub. Serv. Co. of New Mexico*, 25 F.E.R.C. ¶ 61,469, at 62,029, 62,034 (1983).

that continued to own a large percentage of the interstate grids.[12] Congress responded by enacting the Energy Policy Act of 1992 (EPAct), codified in pertinent part at 16 U.S.C. §§ 824j-824m, which, in addition to expanding the ranks of competitive generators to include non-utility "exempt wholesale generators," gave FERC greater authority to order transmission-owning utilities to provide transmission service to competing power suppliers. *See* 16 U.S.C. §§ 824j, 824k; Order No. 888 at 31,644-45, Pet. App. 154a. Specifically, the EPAct "amended section 211 [and 212] of the FPA to give the Commission broader authority to order wheeling [transmission of power for another supplier] on a case-by-case basis." Order No. 888 at 31,673, Pet. App. 191a. As FERC noted, however, this amendment "left unaltered the authorities and obligations of the Commission under sections 205 and 206 . . . to remedy undue discrimination." *Id.* at 31,673, Pet. App. 192a.

C. The FERC Orders at Issue

Vertically integrated utilities that own transmission facilities have the incentive and (absent regulation) the ability to discriminate in crippling ways against competing power suppliers. For example, utilities can reserve their transmission facilities for their own sales and force competing suppliers to make more expensive alternative transmission arrangements, and the utilities can manipulate the transmission "curtailment" process to bar competitors' power from the system during periods of system overload. *See Northern States Power Co. v. FERC*, 176 F.3d 1090 (8th Cir. 1999). These and other forms of discrimination have

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[12] FERC found, "[T]hese entities [new suppliers of power] needed transmission service in order to compete in electricity markets." Order No. 888 at 31,643, Pet. App. 150a. In order for there to be competitive power markets, "all wholesale buyers . . . must have equal access to the transmission grid." NOPR at 33,049, Pet. App. 558a.

state-versus-state impacts: customers in one state frequently are served by generating facilities in (and transmission lines that pass through) other states, and the ability of transmission monopolists to favor their native load can force customers in other states to rely on more circuitous and costly transmission arrangements or to forgo the transactions altogether. To use a very rough analogy (because, among other things, electric energy does not behave like solid objects moving from point to point over fixed paths) it is as if Wal-Mart, Safeway, and other large retailers each owned large segments of the interstate highway system used to transport goods in bulk to their retail stores, and they were able to charge others more for the use of their segments of the highway system than they implicitly charge themselves, and could force other users off the highway system onto inefficient and more costly back roads (or off the road entirely) whenever traffic became congested.

In Order No. 888 and, after rehearing, Order No. 888-A, FERC found that the traditional utilities that own much of the interstate transmission grid were in fact engaged in widespread and entrenched undue discrimination against competing users. FERC further found that the case-by-case authority to order transmission provided by the EPAct amendments to sections 211 and 212 was insufficient to remedy such discrimination and that it must use its broader powers under sections 205 and 206. Then, however, FERC, virtually without explanation, held itself powerless to address the vast majority of the problem.

Findings of Undue Discrimination. FERC found that the utilities that own portions of the transmission grid have inherent incentives to discriminate against other suppliers and are actually doing so:

> [U]tilities owning or controlling transmission facilities possess substantial market power; . . . as profit maximizing firms, they have and will continue to exercise that market power in order to maintain and increase market share, and will thus deny their wholesale customers access to competitively priced electric generation; and . . . these unduly discriminatory practices will deny consumers the substantial benefits of lower electricity prices.

NOPR at 33,052, Pet. App. 566a. Structural characteristics in the industry "make it inevitable that [the transmission-owning utilities] will act in their own self-interest to the detriment of others by refusing transmission and/or providing inferior transmission to competitors." Order No. 888 at 31,682, Pet. App. 214a; Order No. 888-A at 30,210, Pet. App. 436a. FERC found that vertically integrated utilities have in fact acted on these incentives to harm competitors and competition, as illustrated in the record by an "array of allegations and circumstances raised by customers in individual cases over the years." Order No. 888-A at 30,210, Pet. App. 435a. Examples in the record include refusals to transmit, dilatory tactics amounting to refusals to transmit, and refusals to offer comparable service. *See* Order No. 888 at 31,919-26, Pet. App. 315a-331a.

FERC's (Incomplete) Remedy. FERC understood that under the FPA "it is [FERC's] duty to eradicate unduly discriminatory practices." *Id.* at 31,682, Pet. App. 214a. In this case, FERC determined that a broad remedy was necessary because there was "more than sufficient reason to believe that transmission monopolists . . . will continue to engage in unduly discriminatory practices, unless we fashion a remedy to eliminate their ability and incentive to do so." *Id.* at 31,683, Pet. App. 216a-217a.

The remedy FERC fashioned was "functional unbundling." FERC required every public utility to adopt an "open access transmission tariff" (OATT) dictating the terms of all transmissions for wholesale sales and *un*bundled retail

sales.[13] *Id.* at 31,654, 31,781, Pet. App. 178a, 306a. The terms covered by the tariff include price and other conditions of usage, such as rules of priority when system conditions require curtailment of transmission. *See id.* at 31,721-44, 31,749-50, Pet. App. 254a-264a, 276a-278a; Order No. 888-A at 30,278-79, Pet. App. 456a-60a. FERC also required each utility to "state separate rates for wholesale generation, transmission, and ancillary services." Order No. 888 at 31,654, Pet. App. 178a. In sum, the OATT established that when a utility is selling at wholesale, or at retail on an unbundled basis, it must take transmission for itself on the same terms it offers to others and must reflect the cost of this transmission separately in its bill to the customer.

FERC determined, however, that it did not have authority to extend its functional unbundling remedy to transmissions for bundled retail sales. As a result, the FERC orders permit a vertically integrated utility to transmit its bundled retail sales at no explicit charge; to reserve and schedule its uses of its transmission facilities for such bundled retail sales in ways that freeze out competing uses; and, when physical conditions require imposition of transmission curtailment, to give preference to its own use of the transmission facilities for its own bundled retail sales.

Under FERC's cramped vision of its authority, the open access remedy excludes the roughly 60% of pertinent transmissions that are bundled with retail sales. *See supra* note 4. FERC had previously recognized that failure to

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[13] FERC initially stated that its rule would apply where the utility is either purchasing or selling at wholesale. *See* Order No. 888 at 31,654, Pet. App. 178a. But, on rehearing, FERC dropped the reference to wholesale purchases. Accordingly, if a utility buys bulk power and resells it at retail on a bundled basis, the OATT requirements do not apply. *See* Order No. 888-A at 30,216-17, Pet. App. 451a-453a. The utility is thus freed from the OATT when using the transmission system to supply its own retail needs.

require utilities to take transmission for their retail sales under the OATT "raises the possibility that . . . transmission service for retail purposes will be superior" to wholesale. NOPR at 33,081-82, Pet. App. 634a. But in Order No. 888, FERC nevertheless concluded that "[a]lthough the [functional] unbundling of retail transmission and generation . . . would be helpful in achieving comparability, we do not believe it is necessary. In addition, it raises numerous difficult jurisdictional issues . . . ." Pet. App. 235a.

FERC offered no explanation in Order No. 888 of its "belie[f]" that application of the OATT to bundled retail sales was not "necessary." In its order on rehearing, Order No. 888-A, FERC did not reassert that regulating transmission for unbundled retail sales was not "necessary"; it relied instead solely on the jurisdictional point. *See* Pet. App. 453a-456a. As to that point, FERC correctly noted that "[u]nlike our jurisdiction over *sales* of electric energy, which section 201 of the FPA specifically limits to sales at wholesale, the statute does *not* limit our *transmission* jurisdiction over public utilities to wholesale transmission." Order No. 888 at 31,781, Pet. App. 305a (emphasis added). Accordingly, FERC said, "when a retail transaction is broken into two products that are sold separately . . . we believe the . . . unbundled transmission service involves *only* the provision of 'transmission in interstate commerce' which, under the FPA, is exclusively within the jurisdiction of [FERC]." *Id.*, Pet. App. 306a. But, in a direct about-face, FERC then said, "when transmission is sold at retail as part and parcel of the delivered product called electric energy, the transaction is a sale of electric energy at retail" and, thus, FERC implied, beyond the agency's jurisdictional reach. *Id.* FERC did not even attempt to explain why the bundling of the cost of electricity and the cost of transmission as an accounting and invoicing matter should be legally determinative of its jurisdiction over the activity of interstate transmission.

D. Proceedings in the D.C. Circuit

On petitions for review, the D.C. Circuit upheld FERC's orders against challenges both that they exceeded FERC's jurisdiction and that they did not go far enough to carry out FERC's statutory obligations to remedy undue discrimination. *See Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 681, 687 (D.C. Cir. 2000), Pet. App. 8a-9a. 20a-21a. The State of New York and other parties contended that FERC has no jurisdiction over interstate transmission for *any* retail sales, even unbundled ones; the D.C. Circuit rejected this contention, holding that the Act confers jurisdiction over unbundled interstate transmission of electric energy whether it is then sold at wholesale or retail. *See* Pet. App. 34a-35a. Other parties challenged FERC's authority to remedy the undue discrimination it had found by requiring utilities to grant open access to their facilities used for interstate transmissions, arguing that the FPA did not confer such jurisdiction on FERC; the D.C. Circuit also rejected this argument, finding that FERC had "authority under FPA §§ 205 and 206 to require open access as a generic remedy to prevent undue discrimination." Pet. App. 20a-21a.[14]

Conversely, Enron and other parties challenged FERC's failure to provide a complete or adequate remedy for the undue discrimination FERC had found. Enron noted that most electric energy carried over local utilities' transmission facilities is carried for bundled retail sales, and Enron argued

[14] The Board of Water, Light and Sinking Fund Commissioners of The City of Dalton, Georgia (Dalton) and others argued that the record before FERC did not support its finding of undue discrimination and, therefore, FERC had not satisfied one of the legal prerequisites for prescribing any remedy under section 206. The D.C. Circuit disagreed, concluding that the record supported FERC's finding of undue discrimination that needed a remedy. *See* Pet. App. 21a-23a. This Court denied Dalton's petition for a writ of certiorari. No. 00-800.

that FERC's failure to subject such transmission to the OATT would allow vertically integrated utilities to continue to discriminate in favor of themselves and their own retail sales. Citing the unambiguous text of section 201(b) and this Court's holding in *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972) (*LP&L*), Enron argued that FERC has jurisdiction to regulate all interstate transmission of electric energy, regardless of whether that energy is then sold at wholesale or retail, unbundled or bundled. Enron further argued that FERC was required by the statute to remedy all of the undue discrimination it found, including discrimination in transmissions bundled with retail sales. *See* 16 U.S.C. §§ 824d, 824e.

The D.C. Circuit rejected Enron's arguments with respect to bundled retail sales. The court conceded that the FPA could be read to assign FERC jurisdiction over transmission for bundled retail sales: "A regulator could reasonably construe transmissions bundled with generation and delivery services and sold to a consumer for a single charge as . . . transmission services in interstate commerce [within FERC's jurisdiction]." Pet. App. 35a. But the court ruled that FERC's finding that it lacked jurisdiction over bundled interstate transmissions was "a permissible policy choice" entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). The court said:

> FPA § 201 gives FERC jurisdiction over transmissions in interstate commerce and sales at wholesale[;] the statute also clearly contemplates state jurisdiction over local distribution facilities and retail sales. The statute is much less clear about exactly where the lines between those activities are to be drawn. . . . FERC's decision to characterize bundled transmissions as part of retail sales subject to state jurisdiction therefore represents a statutorily

permissible policy choice to which we must . . . defer under *Chevron*.

Pet. App. 35a.

SUMMARY OF ARGUMENT

FERC's decision that it did not have jurisdiction to apply the OATT to transmissions for bundled retail sales was contrary to law. The FPA gives FERC jurisdiction over "transmission of electric energy in interstate commerce." There is no exception from this branch of FERC's jurisdiction for electricity that is sold at retail, or for electricity that is sold on a bundled basis. The FPA also commands FERC, upon finding "undue discrimination," to fully remedy the problem. FERC did find undue discrimination in this case, and it prescribed a rule that addressed a fraction of the problem, but it abdicated its responsibility to remedy the remainder.

I. The FPA is clear that FERC's jurisdiction over interstate transmission is plenary and not limited to transmission for wholesale or unbundled sales. Moreover, this Court has interpreted the nearly identical parallel provision of the Natural Gas Act to confer just such plenary jurisdiction over interstate transportation of natural gas. The legislative history also supports this interpretation.

The D.C. Circuit's suggestion that the scope of FERC's jurisdiction presented a "policy choice" ignores the statute and mistakes the relationship between transmission and sale. The court assumed that FERC was required to choose between treating transmissions for bundled retail sales as "interstate transmissions" *or* as components of a bundled retail sale, but such transmissions are clearly *both*, legally as well as factually. Transmission of energy across state borders does not cease to be interstate transmission merely because it is bundled with a sale of energy as an invoicing matter. In addition, FERC regulation of the terms of

interstate transmission is entirely consistent with state regulation of the terms of retail sale, even though the former is a component of the latter: the state is simply required to recognize the FERC-approved terms of interstate transmission (just as it recognizes other FERC determinations of matters within FERC's jurisdiction) when the state sets retail rates and other retail terms.

It is important to confirm FERC's jurisdiction over all interstate transmission of electricity because such transmission is in interstate commerce, and no state can regulate it constitutionally or successfully. This Court has traditionally followed an "engineering and scientific" approach to determine whether a transmission is interstate. Transmission facilities in every state (except Alaska, Hawaii, and part of Texas) are connected into one of two interstate grids. As a result, even if the contractual buyer and seller of a quantity of electricity are located in the same state, the transmission of electricity needed to consummate the sale uses the entire interstate grid and is in interstate commerce. State-by-state regulation of various sections or various uses of the interstate grids would be unworkable as both a legal and practical matter and would be inconsistent with Congress's objective of promoting competition and providing cheap and reliable power to every region of the Nation.

II. FERC is required to act to remedy the undue discrimination it found, and may not exempt interstate transmissions bundled with retail sales. FERC found pervasive undue discrimination by the utilities that own transmission facilities that comprise portions of the interstate grids: such utilities have strong incentives to prefer their own use of the facilities over uses by competing suppliers or to serve other customers, and they have acted on these incentives. The utilities' have denied their competitors the use of needed transmission facilities, denied competitors the ability to offer power of equal reliability to that provided by

the utilities, and discriminated between customers of different classes and in different states.

FERC's statutory obligation to remedy such undue discrimination is explicit and mandatory. Neither of FERC's excuses for failing to carry out this mandate is correct in law, fact, or policy. FERC's suggestion (later withdrawn) that it was not "necessary" to apply the open-access terms and conditions to transmission for bundled retail sales was wholly unexplained and contrary to the facts FERC found in Order No. 888. The bundled interstate transmissions that FERC left untouched constitute almost 60% of the pertinent transmissions on the interstate grids, and there is no reason why undue discrimination to favor bundled retail sales is any less likely, any less important, or any more easily remedied without the OATT than any other part of the discrimination FERC found. FERC's ultimate excuse that the statute could be read to deny it the needed jurisdiction is an impermissible interpretation of unambiguous statutory language and was an abdication of its statutory responsibilities.

ARGUMENT

I. FERC HAS JURISDICTION OVER ALL INTERSTATE TRANSMISSIONS OF ELECTRIC ENERGY, WHETHER THE ENERGY IS SOLD AT WHOLESALE OR RETAIL, BUNDLED OR UNBUNDLED.

FERC's interpretation of its jurisdiction over interstate electric transmissions under the FPA—finding no jurisdiction when the cost of the transmission is bundled with the cost of power at retail—is contrary to the plain language of the statute and this Court's interpretation of nearly identical language in the parallel provision of the Natural Gas Act. The court of appeals asserted that FERC had made a "permissible policy choice," but the statute neither requires nor permits a choice: FERC's jurisdiction over the terms of

interstate transmissions is both mandatory and perfectly consistent with state regulation of the terms of retail sales. Particularly in view of the important effects of the terms of interstate electric transmission on interstate commerce, the D.C. Circuit's affirmance of FERC's abdication of jurisdiction was a serious error.

A. The Federal Power Act Unambiguously Gives FERC Jurisdiction Over All Interstate Transmissions of Electric Power, Whether for Wholesale or Retail Sale, and Whether Bundled or Unbundled.

Section 201(b) of the FPA, 16 U.S.C. § 824(b), explicitly gives FERC jurisdiction, without any stated limitation or qualification, over all interstate transmissions of electric energy. Both FERC and the D.C. Circuit correctly ruled that this section grants jurisdiction over transmissions for both wholesale and retail sales, rejecting the contrary views of various parties. But then both FERC and the D.C. Circuit read into section 201(b) an exception for transmissions that are bundled at retail, thus excluding the majority of pertinent interstate transmissions from Order No. 888's open access remedy. This was error: both the agency and the court were bound by the plain meaning of the statute. *Chevron*, 467 U.S. at 842-43.[15]

1. FERC Has Jurisdiction Over Transmissions for Both Wholesale and Retail Sales.

Section 201(b) grants FERC jurisdiction over (a) "the transmission of electric energy in interstate commerce," and

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[15] FERC itself found that the statutory grant of federal jurisdiction over all interstate transmissions of electric energy is unambiguous. *See* Order No. 888 at 31,781, Pet. App. 305a ("[S]ection 201 of the FPA, *on its face* . . . gives the Commission jurisdiction over transmission in interstate commerce . . . without qualification.").

(b) "the sale of electric energy at wholesale. . . ." 16 U.S.C. § 824(b). Section 201(a), 16 U.S.C. § 824(a), contains the same two distinct phrases. The words "at wholesale" do not appear in the phrase describing transmission and do not limit FERC's jurisdiction over transmission.

FERC and the D.C. Circuit correctly concluded that FERC's jurisdiction over interstate transmission extends to transmission for retail as well as wholesale sales. FERC held, "Unlike our jurisdiction over sales of electric energy, which section 201 specifically limits to sales at wholesale, the statute does not limit our transmission jurisdiction over public utilities to wholesale transmission . . . ." Order No. 888 at 31,781, Pet. App. 305a. The D.C. Circuit accepted this finding. *See* Pet. App. 35a.

This interpretation is also compelled by this Court's interpretation of the nearly identical parallel provision of the Natural Gas Act (NGA), 15 U.S.C. § 717b.[16] Section 1(b) of that statute gives FERC jurisdiction over "[1] the transportation of natural gas in interstate commerce, [and] [2] the sale in interstate commerce of natural gas for resale." In *LP&L*, the Court explained that "[e]ach of these is an independent grant of jurisdiction and, though the Act's application to 'sales' is limited to sales of interstate gas for resale, the Act applies to interstate 'transportation' regardless of whether the gas transported is ultimately sold retail or wholesale." 406 U.S. at 636. In keeping with the Court's "established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes," *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981), the *LP&L* decision would be controlling even if the

[16] The only differences in the language are that the NGA refers to "transportation of natural gas" rather than "transmission of electric energy," and refers to the "sale in interstate commerce of natural gas for resale" rather than "sale of electric energy at wholesale in interstate commerce."

FPA's statutory language were not itself clear. *See Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990) ("Once [this Court has] determined a statute's clear meaning, [it] adhere[s] to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning.").

The legislative history of the FPA confirms this interpretation. For example, the Senate Report on the bill that contained section 201 stated, "Jurisdiction is asserted . . . over *all* interstate transmission lines whether or not there is a sale of the energy carried by those lines . . . ." S. Rep. No. 74-621, at 48 (1935) (emphasis added). Congress rejected attempts to limit federal transmission jurisdiction to transmissions for wholesales. For example, representatives of the National Association of Railroad and Utility Commissioners (NARUC, predecessor of a petitioner in No. 00-568) attempted to persuade Congress to limit federal transmission jurisdiction to the small category of transmissions (then one to two percent of all transmissions of electric energy) for wholesales. *See Public Utility Holding Cos., Hearings on H.R. 5423 Before the House Comm. on Interstate and Foreign Commerce*, 74th Cong. 1612-13 (1935) (*Hearings on H.R. 5423*) (statement of H. Lester Hooker, Chairman of the Legislative Comm. of NARUC). NARUC proposed an amendment to section 201(b) stating, "[T]he provisions of this title shall apply only to the transmission and sale at wholesale of electric energy in interstate commerce . . . ." *See id.* at 1660 (statement of John E. Benton, General Solicitor of NARUC). Congress rejected this limiting language and enacted the broader jurisdictional grant still contained in section 201(b). As one witness summarized,

> Whether it be *wholesale or retail*, as I understand it, the transmission of the current from one State to another is interstate commerce. Now, what the

> consequence of that may be is an entirely different matter, but under this bill it is one of the reasons asserted for jurisdiction and I am merely reciting those reasons as part of my case.

Id. at 666 (statement of Preston Arkwright, President of Georgia Power Company) (emphasis added).

2. FERC's Jurisdiction Over Interstate Transmissions for Retail Sales Is Not Limited to Transmissions That Are Unbundled for Billing Purposes.

Section 201(b) contains no words limiting FERC's jurisdiction over retail transmissions to unbundled transmissions. Indeed, there is nothing in the statutory language suggesting that FERC's transmission jurisdiction is in any way qualified by or related to the terms on which the transmitted electric energy is sold. Moreover, this Court's interpretation of the parallel NGA provision in the *LP&L* case is again squarely on point. The gas sales at issue in *LP&L* were "direct" retail sales by the pipeline-owning utility, the equivalent of "bundled" retail sales by a transmission-owning electric utility. This Court rejected the contention that there was any exception from the FPC's transmission jurisdiction for direct sales. *See* 406 U.S. at 636-38. Neither FERC nor the Court may ignore the words of the statute or this Court's prior interpretation of them. *See Maislin Indus., U.S., Inc.*, 497 U.S. at 131.[17]

[17] The specific issue in *LP&L* was whether the FPC had jurisdiction to impose, under conditions of temporary shortage of natural gas supply, an orderly plan of curtailment that would include direct retail sales. This Court reversed a court of appeals ruling that the FPC lacked jurisdiction to curtail deliveries to direct sales customers. *See* 406 U.S. at 636. In the present case, one very important feature of the mandated OATT is that when electric system overload conditions require curtailment of transmission, a transmission-owning utility may not discriminate in favor of its own retail customers and against other generating and marketing companies that have purchased "firm" transmission service. *See* Order No. 888 at 31,748-49, Pet. App. 274a-277a. One court of appeals has already held, erroneously, that FERC does not have the power to impose a curtailment plan that covers interstate transmissions for retail sales. *See Northern States Power Co. v. FERC*, 176 F.3d 1090 (8th Cir. 1999), *cert. denied*, 528 U.S. 1182 (2000). FERC opposed Enron's petition for a writ of certiorari in that case, No. 99-916, on the ground that the matter should await the D.C. Circuit's decision in the present case, and the petition was denied.

The legislative history confirms that Congress understood that the FPC's jurisdiction over transmissions in interstate commerce would include transmissions for bundled retail sales. The committee report discussions of transmission in interstate commerce, over which FERC would have jurisdiction, contain no hint of any distinction between transmissions for unbundled and bundled sales. *See* S. Rep. No. 74-621, at 17, 19 (1935); H.R Rep. No. 74-1318, at 7, 27 (1935).

In the orders under review, FERC created an exception for transmission for bundled retail sales found nowhere in the language of the FPA. The D.C. Circuit characterized FERC's ruling as a "policy choice" and deferred to FERC. The court said,

> FPA § 201 gives FERC jurisdiction over transmissions in interstate commerce and sales at wholesale[;] the statute also clearly contemplates state jurisdiction over local distribution facilities and retail sales. The statute is much less clear about exactly where the lines between those activities are to be drawn. A regulator could reasonably construe transmissions bundled with generation and delivery services and sold to a consumer for a single charge as *either* transmission services in interstate commerce *or* as an integral component of a retail

> sale. . . . FERC's decision to characterize bundled transmissions as part of retail sales subject to state jurisdiction therefore represents a statutorily permissible policy choice to which we must . . . defer under *Chevron*.

Pet. App. at 35a (emphasis added).

But there are no such "lines," and the "policy choice" posited by the court of appeals is an entirely false one that has no basis in the statute or fact. The transmissions at issue are *both* interstate transmissions of electric energy, as to which FERC has the authority and the duty to eliminate undue discrimination, *and* (if the utility elects to set a single bundled charge) components of state-regulated bundled retail sales. A transmission in interstate commerce does not cease to be an interstate transmission because of the manner in which the electricity is then sold.

There is nothing illogical or inappropriate about FERC's regulation of interstate transmission merely because its cost becomes a component of the price at which electricity is sold in a bundled retail sale regulated by a state. On the contrary, that is exactly the relationship between FERC regulation of wholesale prices and state regulation of retail prices. The price charged in a FERC-regulated wholesale transaction is a cost to the retailer, which must be recognized by the state regulator in fixing retail prices, but this is in no way inconsistent with the state's plenary jurisdiction over the retail sale as such. As this Court explained in *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986), FERC establishes the terms, including price, of wholesales; the state then regulates the prices at which the retailer sells. But whether those retail prices are bundled or unbundled, the state regulator must "recognize a FERC-approved [wholesale] price as a reasonable cost for purposes of retail ratemaking." *Id.* at 973. In *Nantahala*, the principle was applied to the FERC-filed allocation of low- and high-cost wholesale power received by the retailer, but exactly the

same principle can—and must—be applied to the terms on which the retailer receives transmission service.

In sum, FERC's decision in this case to "characterize" some interstate transmissions as subject only to state regulation was contrary to the statute and an abdication of its statutory responsibility.[18]

B. FERC's Abdication of Jurisdiction Over Interstate Transmission for Bundled Retail Sales Is an Important Error, Because All Transmissions of Electric Energy on the Interstate Grids Are in Interstate Commerce.

The electric industry is by many measures the largest and most important industry in the United States, affecting every part of the economy and almost every part of private

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[18] Ironically, the D.C. Circuit had itself earlier explained one important reason why the FERC interpretation, rejected under the NGA in *LP&L* and reasserted under the FPA in the present case, is necessarily wrong. In *Mississippi River Transmission Corp. v. FERC*, 969 F.2d 1215 (D.C. Cir. 1992), the court ruled that FERC had jurisdiction to regulate a natural gas transportation rate "imbedded in" a bundled retail sale. *MRT*, 969 F.2d at 1219 n.4. Holding that FERC's authority over "such transactions is beyond dispute," the court explained that any other rule would invite manipulation by the utility, which would be able to choose its regulator simply by offering bundled or unbundled pricing of the same product and service:

> As far as the statute is concerned, there would have been no doubt of FERC's section 1(b) authority if MRT, instead of charging a bundled price, had charged separately for transporting the gas and for the gas itself. To accept MRT's position would therefore be tantamount to conferring on private parties the power to decide whether FERC could set the rate for interstate transportation. Private parties would have this power because it would be entirely up to them whether to structure a direct sale and interstate-transportation transaction in terms of a bundled price or separate charges.

Id. at 1217-18.

life. As FERC has at least partially recognized, establishing a transmission system capable of effectively meeting the Nation's energy needs depends on opening the interstate transmission grids to robust competition among suppliers of electricity. *See* Order No. 888 at 31,646, 31,652, Pet. App. 158a, 171a-172a; NOPR at 33,049, Pet. App. 558a; *see also TAPS*, 225 F.3d at 681-82, Pet. App. 10a. But if the decision below stands, no regulatory body, federal or state, will have the authority to eliminate undue discrimination in interstate transmissions for bundled retail sales.

The need for federal regulation of interstate transmission results in part from the physical behavior of electricity in the grid. Electricity does not follow the paths implied in contracts between buyers and sellers or in utility rate schedules. On the contrary, the electric energy on a grid can be conceptualized as a pool to which every connected generation facility contributes and from which every connected user draws.[19] Accordingly, because the transmission facilities in every state except Alaska, Hawaii, and part of Texas are interconnected into one of the two grids, every transmission over any part of either grid is in interstate commerce. Moreover, every public rule or private procedure for the use of any portion of the interstate grid to some degree affects every supplier's and every user's costs and ability to sell or receive reliable power. "Undue discrimination" by the owner of a part of the grid must therefore be eliminated by FERC or not at all.

The FPA and this Court's precedent provide FERC with the authority to regulate effectively. The FPA provides that electric energy "shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof . . . ." *See* FPA § 201(c), 16 U.S.C. § 824(c). The Court has interpreted this definition to include

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[19] *See supra* pp. 5-6.

any transmission of electric energy over a high voltage transmission line connected to an interstate transmission grid. *See FPC v. Florida Power & Light*, 404 U.S. 453 (1972) (*FP&L*). To determine whether a transmission of electric energy is in interstate commerce as defined in section 201(c), the Court has said it will look to "an engineering and scientific, rather than a legalistic or governmental, test." *See id.* at 454 (quoting *Connecticut Light & Power Co. v. FPC*, 324 U.S. 515, 529 (1945)) (internal quotations omitted). The determination has never turned on an accounting or invoicing procedure (e.g., bundling) or on the contractual relationship between the supplier and customer, but on a scientific understanding of transmission.

In *FP&L*, this Court, addressing the science, focused on the point of interconnection, the "bus" between facilities connected to an interstate grid. The Court accepted FERC's finding that even though the electric utility's own generation facilities were located in the same state as its customer, because of interconnections electric energy necessarily crossed the state line at the bus. *See id.* at 461-63. Because some electricity generated in a state is necessarily consumed in other connected states, and some electricity consumed in a state is necessarily supplied by generation facilities in other connected states, the Court held that transmissions over the interconnected grid are in interstate commerce. *See id.*; *Florida Power & Light*, 37 F.P.C. 544, 550 (1967) ("there is a commingling of energy from different sources at a bus with the result that energy which flows away from such bus is so fully commingled as to consist of energy which has entered the bus both from interstate and intrastate sources"). As Justice Douglas noted in his dissent in *FP&L*, the decision meant that "every privately owned interconnected

[transmission] facility in the United States . . . is within the FPC's jurisdiction." 404 U.S. at 471.[20]

Although the Court spoke in *FP&L* of electrons crossing state lines, the "engineering and scientific" truth is much broader. Every use of electric energy by a connected user is served by all generators connected to the grid, not by a specific generation source. When facilities are interconnected, electric energy does not travel on a closed path from a particular generator to a specific distribution point. On the contrary, electric energy from all generators connected to the grid forms a pool of energy that services all load requirements throughout the grid. If a utility's generation facility is connected to the grid, its output cannot be segregated for use to serve in-state or any other specific load. "All of the electric energy produced by all the generating units [on an interconnected system] is delivered to the common coordinated and integrated modern transmission

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[20] The legislative history of the FPA contains explanations to Congress of the precise point that Justice Douglas explained (and against which he protested in dissent) in *FP&L*: that interconnection was sufficient to create interstate transmission. For example, a study prepared by Yale Law School Professor Richard Joyce Smith and presented at the 1935 hearings stated:

> In the absence of far-flung technological tie-ups and financial ententes, electric utilities undoubtedly are in fact local enterprises and the regulatory machinery of the individual State, through periodic revisions, may have been adequate to cope with their activities. But once the industry begins to transcend State boundaries either *by physical interconnections* or by subtle business and financial affiliations the theory of State regulation may become obsolete. . . . Decisions as to the power of the Federal Government to regulate interstate light and power business thus far have assumed that the determinant of interstate business is *physical interconnection* with actual transmission across State boundaries.

Hearings on H.R. 5423, at 77, 97 (emphasis added).

system from which all of the customers are supplied." *Florida Power & Light*, 37 F.P.C. at 566. Viewed differently, "[t]here is no way to determine what path electricity actually takes between two points or indeed whether the electricity at the point of delivery was ever at the point of origin." *See Northern States Power Co. v. FERC*, 30 F.3d 177, 179 (D.C. Cir. 1994).

For the grid to operate, its facilities must be electromagnetically synchronized; that is, all generators must be operated so that they rotate at 60 cycles per second (or a multiple thereof). This "synchronism" is maintained by a combination of automatic and human-controlled measures that respond to changes in both demand and supply. Every use physically affects the entire system, drawing on all sources and, to some degree, employing all of the interstate grid to transmit the power being used. "'[I]f a housewife in Atlanta on the Georgia system turns on a light, every generator on Florida's system almost instantaneously is caused to produce some quantity of additional electric energy which serves to maintain the balance in the interconnected system between generation and load.'" *FP&L*, 404 U.S. at 460 (quoting 37 F.P.C. at 567-68). Similarly, a transmission line that is downed (or taken off line by its owner) in Florida affects the flow of power to users in every state in the Eastern Interconnection. *See* 37 F.P.C. at 567-68.

State regulation clearly could not eliminate the undue discrimination FERC found. First, as a physical matter, since uses of the grids cannot be separated into discrete transmissions from generators to distribution points, each grid must be regulated as an interstate whole. Second, since competing generation facilities, competing suppliers, and different users are located in different states, and transmissions between them involve and affect facilities used by all of them, no state could constitutionally regulate the

terms that give rise to undue discrimination. *See LP&L*, 406 U.S. at 632-33.[21] Third, even to the extent the states could constitutionally promulgate regulations, the inevitable effect of their attempt would be varied and conflicting regulatory programs reflecting the competing interests of different states and their suppliers and users. *See id.* at 632-34 (state regulation of interstate transportation for "direct" sales of gas would "produce a seriously inequitable system" created by an "unavoidable conflict between producing States and consuming States" and the States' incentive to regulate in the "State, not the national interest."); *see also Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983) ("[T]ransmission of energy is an activity particularly likely to affect more than one State, and its effect on interstate commerce is often significant enough that uncontrolled regulation by the States can patently interfere with broader national interests.").

FERC cannot disclaim its statutory authority to regulate all interstate transmissions. "[W]hen [the court] is presented with an attempt by the federal authority to control a problem that is not, by its very nature, one which state regulatory commissions can be expected to deal, the conclusion is irresistible that Congress desired regulation by federal authority rather than nonregulation." *LP&L*, 406 U.S. at 641 (quoting *FPC v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 28 (1961)) (internal quotations omitted). The very reason Congress adopted the FPA was to give the FPC jurisdiction over areas beyond the states' constitutional and practical reach. *See Arkansas Elec.*, 461 U.S. at 384 ("nothing in the language, history, or policy of the Federal Power Act

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[21] *See Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927); *see also Healy v. The Beer Inst.*, 491 U.S. 324, 336 (1989) ("The critical [constitutional] inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.").

suggests" that Congress intended to leave an aspect of the industry "unregulated. . . . Congress's purpose in 1935 was to fill a regulatory gap, not to perpetuate one"); S. Rep. No. 74-621, at 17 (noting, in discussing the purpose of the legislation, that both the "regulatory gap" created by *Attleboro* as well as "[o]ther features of this interstate utility business are equally immune from State control either legally or practically"). FERC's denial of its statutory authority threatens Congress's objectives of non-discriminatory, free, and open competition among suppliers and a cheap and reliable supply of power to users in every part of the Nation.

II. BY REFUSING TO EXTEND OPEN ACCESS TO BUNDLED RETAIL TRANSMISSIONS, FERC VIOLATED ITS OBLIGATION UNDER THE FEDERAL POWER ACT TO CORRECT THE PERVASIVE DISCRIMINATION IT FOUND.

As FERC acknowledged in the orders under review, "it is our statutory *obligation* under sections 205 and 206 of the Federal Power Act to remedy undue discrimination," and "[t]o do so, we must eliminate the remaining patchwork of closed and open jurisdictional transmission systems and ensure that *all* these systems . . . cannot use monopoly power over transmission to unduly discriminate against others." Order No. 888 at 31,635, Pet. App. 133a (emphasis added). Moreover, FERC itself held that "[t]he *only* way to effectuate competitive markets and remedy discrimination is through readily available, non-discriminatory transmission access." Order No. 888-A at 30,176, Pet. App. 382a (emphasis added). Yet the final rule FERC adopted exempts transmission included in bundled retail sales from any open access requirements at all.

Where Congress commands an agency to adopt a remedy for all discrimination that it finds, as it did in section 206 of the FPA, 16 U.S.C. § 824e(a), the agency is denied discretion; it may not address only a small fraction of the

problem and then fold its tent. FERC's suggestion in Order No. 888 (abandoned by FERC on rehearing) that open access is not "necessary" for bundled retail transmission was both unsupported and wrong. And FERC's refusal of jurisdiction over the 60% of relevant interstate transmission that is billed as a bundled retail charge is based on a misreading of the FPA.

A. FERC's Decision Not To Remedy the Discrimination It Found in Sixty Percent of Pertinent Transmissions Violates Sections 205 and 206 of the Federal Power Act.

As FERC itself recognized in the orders under review, the Federal Power Act "'fairly bristles' with concern for undue discrimination." Order No. 888 at 31,669, Pet. App. 181a-182a (quoting *Associated Gas Distribs. v. FERC*, 824 F.2d 981, 998 (D.C. Cir. 1987)). Section 205(b) of the FPA forbids any public utility subject to FERC's jurisdiction from "mak[ing] or grant[ing] any undue preference or advantage to any person or subject[ing] any person to any undue prejudice or disadvantage." 16 U.S.C. § 824d(b). If FERC finds such discrimination, section 206(a) of the FPA commands FERC to remedy it:

> Whenever the Commission ... shall find that any rate, charge, or classification demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission *shall* determine the just and reasonable rate, charge, classification, ... practice, or contract to be thereafter observed and in force, and *shall* fix the same by order.

Id. § 824e(a) (emphasis added).

Section 206 is mandatory. Congress directed that FERC "shall" determine and fix a remedy, not that it "may" do so. An agency is required to follow such directives. *See, e.g.*, *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935) ("'shall' ... is the language of command").[22] This Court has recognized that sections 205 and 206 of the FPA are "directives," not guidelines. *Gulf States Utils. Co. v. FPC*, 411 U.S. 747, 759 (1973). Under section 206, "the Commission has the duty—not the option" to remedy whatever unjust, unreasonable, and discriminatory practices it finds. *Louisiana Pub. Serv. Comm'n v. FERC*, 184 F.3d 892, 897 (D.C. Cir. 1999). Indeed, FERC itself has always understood section 206 as a command, not a suggestion. Both the orders under review,[23] and other FERC orders,[24] acknowledge repeatedly that FERC

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[22] *See also McLaurin v. Prater*, 30 F.3d 982, 984 (8th Cir. 1994) ("the word 'shall' ... is a mandatory command .... '[S]hall' does not mean 'may' or 'is permitted to'; 'shall' has been consistently understood to mean that something is required."); *Ass'n of American Railroads v. Costle*, 562 F.2d 1310, 1312 (D.C. Cir. 1977) (where a statute directs that an agency "shall" regulate, it must do so, because "[t]he word 'shall' is the language of command in a statute").

[23] *See, e.g.*, Order No. 888 at 31,635, Pet. App. 133a ("[I]t is our statutory *obligation* under sections 205 and 206 of the Federal Power Act (FPA) to remedy undue discrimination.") (emphasis added); *id.* at 31,669, Pet. App. 182a-183a (describing the FPA's antidiscrimination "mandates" and concluding that "we have ample legal authority—indeed, a responsibility—under section 206 of the FPA to order the filing of non-discriminatory open access transmission tariffs if we find such order necessary as a remedy for undue discrimination"); *id.* at 31,676, Pet. App. 198a-199a ("Sections 205 and 206 of the FPA *mandate* that we ensure that, with respect to any transmission in interstate commerce ... no person is subject to any undue prejudice or disadvantage.") (emphasis added); *id.* at 31,682, Pet. App. 214a ("it is our *duty* to eradicate unduly discriminatory practices") (emphasis added).

[24] *See Southern Co. Servs., Inc.*, 83 F.E.R.C. ¶ 61,079, at 61,383, 61,386-87 (1998) (quoting Order No. 888); *Pacific Gas & Elec. Co.*, 77 F.E.R.C. ¶ 61,204, at 61,793, 61,819 (1996) (under section 206 FERC has the "obligation" to remedy undue discrimination); *Middle S. Energy, Inc.*,

has a statutory duty to remedy all undue discrimination it finds.

In the orders under review, FERC expressly found the kind of undue discrimination that Congress directed the agency to remedy. FERC specifically found that vertically integrated utilities regularly discriminate by providing themselves and their affiliates transmission superior to the transmission they provide to competing power suppliers. The orders document outright refusals to transmit and delaying tactics used by transmission owners to block competing suppliers from delivering electric energy to customers, as well as inferior service and inferior terms imposed by utilities on competing suppliers who lack transmission alternatives. *See* Order No. 888 at 31,683, 31,926, Pet. App. 215a-216a, 315a-331a. FERC also clearly found that this discrimination will continue unless FERC acts to stop it:

> We conclude that unduly discriminatory and anticompetitive practices exist today in the electric industry and, more importantly, that such practices will increase as competitive pressures continue to grow in the industry, unless the Commission acts now to prevent such practices. . . . The inherent characteristics of monopolists make it inevitable that they will act in their own self-interest to the detriment of others by refusing transmission and/or providing inferior transmission to competitors in the bulk power markets to favor their own generation, and it is our duty to eradicate unduly discriminatory practices.

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26 F.E.R.C. ¶ 63,044, at 65,093, 65,113-14 (1984) (section 206 "mandates that the Commission must revise the terms of [contracts among utilities] to eliminate undue preferences or discrimination").

Id. at 31,682, Pet. App. 213a-214a. FERC reaffirmed these findings on rehearing:

> [T]he vast majority of utilities historically have declined to transport electric energy that would compete with their own sales or have offered access that is inferior to what they use for their own sales. . . . [D]iscrimination in transmission services, when viewed in light of utilities' own uses of their transmission systems compared to what they offer third parties, has denied and will continue to deny customers access to electricity at the lowest reasonable rates. The entities on rehearing have raised nothing to persuade us that it is in the interests of consumers to maintain the self-evident incentives for transmission owners to exercise their monopoly power over transmission to discriminate in favor of their own generation sales—incentives that will only increase in the future as competitive pressures continue to escalate.

Order No. 888-A at 30,210, Pet. App. 436a-437a.[25] In making these findings, FERC did not distinguish between bundled and unbundled transmission or suggest that transmission owners' incentives to discriminate depend in any way on how the cost of transmission is accounted for and invoiced at retail.

Notwithstanding these clear findings of pervasive discrimination and Congress's instruction to remedy all undue discrimination it finds, FERC took aim at only a small

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[25] FERC also noted that this sort of discrimination against independent power suppliers was a subject of particular congressional concern. *See id.* at 30,176, Pet. App. 382a (finding that discrimination, "if permitted to continue, will smother the fledgling competition in electricity markets and undermine the national policies reflected in the Energy Policy Act of 1992 to encourage the development of competitive markets").

slice of the problem and declared victory. Despite finding that the "only way to effectuate competitive markets and remedy discrimination is through readily available, non-discriminatory transmission access," *id.* at 30,176, Pet. App. 382a, FERC refused to extend open access to transmission bundled at the retail level—leaving about 60% of all relevant transmission beyond the reach of the "only" effective remedy. Moreover, FERC's purported solution even for unbundled sales is illusory: unless a state regulator makes retail unbundling mandatory, a vertically integrated utility may opt in or out of open access simply by changing the way it bills its retail customers. An antidiscrimination rule that permits the discriminators to decide whether the rule applies is no rule at all. *See Mississippi River Transmission Corp. v. FERC*, 969 F.2d 1215, 1219 (D.C. Cir. 1992) (observing that interpreting the NGA not to grant FERC jurisdiction over bundled retail transportation of natural gas would "be tantamount to conferring on private parties the right to decide whether FERC could set the rate for interstate transportation. Private parties would have this power because it would be entirely up to them whether to structure a direct sale and interstate-transportation transaction in terms of a bundled price or separate charges").

Where Congress orders an agency to remedy an identified problem, Congress intends the agency to remedy *all* of the problem. *See, e.g., Ass'n of American Railroads v. Costle*, 562 F.2d 1310 (D.C. Cir. 1977) (where Congress directed EPA to promulgate noise emission standards for railroad "equipment and facilities," EPA's regulation of only some "equipment and facilities" did not satisfy its obligation, and the agency was required to regulate further until its obligation was fulfilled). By refusing to adopt any remedy at all for discrimination in transmissions bundled with retail sales, FERC violated section 206 of the FPA.

B. FERC's Excuses for Declining To Address Discrimination in Transmissions for Bundled Retail Sales Are Not Valid.

FERC's attempts to justify its refusal to apply its remedy to interstate transmission for bundled retail sales are unsupported by the record and remarkably terse. A single paragraph in Order No. 888 states, without any explanation or record support, that "[a]lthough the unbundling of retail transmission and generation . . . would be helpful in achieving comparability, we do not believe it is necessary"; in addition, FERC said such unbundling "raises numerous difficult jurisdictional issues" that it did not further discuss. Order No. 888 at 31,699, Pet. App. 235a. On rehearing, in Order No. 888-A, FERC abandoned its earlier "not . . . necessary" remark, deciding instead that it does not have jurisdiction over the interstate transmission component of bundled retail sales. *See* Pet. App. 454a-456a. Neither excuse justifies FERC's failure to carry out the antidiscrimination command of section 206.

1. FERC's Initial Suggestion That Full Open Access Is Not "Necessary" To Eliminate Undue Discrimination Is Unsupported and Does Not Excuse FERC's Failure To Carry Out the FPA's Command.

In Order No. 888, FERC declined to apply the OATT to transmissions for bundled retail sales, stating without explanation that although full open access would be "helpful" to eliminate undue discrimination, it was "not . . . necessary." Pet. App. 235a. FERC did not assert, or offer any evidence, that the problem of undue discrimination in interstate transmission is any less pervasive or less important with respect to transmissions that are sold at retail at a bundled price, nor did it find that discrimination in this segment could be cured by any means other than open access. FERC's carveout thus violated the basic principles of administrative

law that an agency must explain its actions and must base its factual findings on substantial evidence. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48, 52 (1983) ("an agency must cogently explain why it has exercised its discretion in a given manner"; there must be a "rational connection between the facts found and the choice made") (internal quotation omitted).[26] In this case, not only is FERC's "not . . . necessary" suggestion unsupported by the substantial evidence required by the FPA, *see* 16 U.S.C. § 825*l*, it wholly contradicts the facts that the agency did find.

The orders under review reflect a record establishing that the vertically integrated utilities' monopoly control over the interstate transmission grid has been "the single greatest impediment" to competition in bulk power marketing, NOPR at 33,049, Pet. App. 558a, and that the discriminatory behavior of these utilities threatens to "smother the fledgling competition in electricity markets and undermine the national policies reflected in the Energy Policy Act of 1992 to encourage the development of competitive markets." Order No. 888-A at 30,176, Pet. App. 387a. FERC documented

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[26] This Court and others have often rejected such conclusory agency pronouncements. *See, e.g., Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167-68 (1962) (reversing agency action because of the agency's failure to explain election between two remedies: "There are no findings and no analysis here to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion"); *United States Telecom Ass'n v. FCC*, 227 F.3d 450 (D.C. Cir. 2000) (vacating FCC order that did not explain its use of key statutory terms or the basis for its conclusions); *see also Rocky Mountain Helicopters, Inc. v. FAA*, 971 F.2d 544, 547-48 (10th Cir. 1992) (vacating conclusory agency finding as not supported by substantial evidence); *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043 (7th Cir. 1992) (vacating FCC order where agency failed adequately to explain key findings); *City of Kansas City, Missouri v. Dep't of Hous. & Urban Dev.*, 923 F.2d 188, 194 (D.C. Cir. 1991) (finding arbitrary and capricious agency action based on a factual premise contradicted by the agency's record).

example after example of discriminatory conduct: outright refusals to transmit, delay tactics, and inferior terms of service. *See* Order No. 888 at 31,683, 31,919-26, Pet. App. 215a-216a, 315a-331a. And FERC concluded that nothing short of open access was sufficient to remedy this pervasive undue discrimination. *See* Order No. 888-A at 30,176, Pet. App. 382a.

None of these findings distinguishes between transmissions for bundled sales and unbundled sales, and there is no reason to expect any such distinction. A vertically integrated utility has the same control over the transmission facilities that competitors need, and the same ability to discriminate, regardless of how the utility accounts for and bills for its services at retail. For that reason, FERC described the need for open access broadly, suggesting that "all" transmission facilities must move to open access to avoid "benefit[ing] some customers at the expense of others." Order No. 888 at 31,635, Pet. App. 133a; *see also* NOPR at 33,071, Pet. App. 611a ("Unless all public utilities are required to provide non-discriminatory open access transmission, the ability to achieve full wholesale power competition, and resulting consumer benefits, will be jeopardized."). Indeed, in its Notice of Proposed Rulemaking, FERC recognized that limiting open access to unbundled transmission "raises the possibility that the quality of transmission service for retail purposes will be superior to the quality of transmission service offered for wholesale purposes," Pet. App. 634a, but the agency never returned to this concern at any point in its proceedings.

Exempting transmissions for bundled retail sales allows the vertically integrated utilities pervasive unfair advantages in supplying and purchasing electricity. For example:

(a) A utility can reserve superior transmission capacity for its own bundled retail sales, at times even closing its facilities to other transmissions. *See* Order No. 888 at 31,919-26, Pet. App. 315a-331a. Doing so distorts

competition, forcing competitors of the utility to scramble for less direct, less predictable and more expensive transmission options, assuming that any transmission options are available at all. *See* Narashima Rao & Richard D. Tabors, *Transmission Markets: Stretching the Rules for Profit and Fun*, 13 Elec. J. 20, 27 (2000).

(b) The exemption enables the transmission-owning utility to preclude competition for those customers (e.g., computer server farms or hospitals) that need very high levels of service reliability, because utilities are effectively free to impose curtailment plans allowing them to favor their own bundled retail sales under conditions of system constraint.[27]

(c) In addition to anti-competitive behavior by utilities, some states have threatened, in response to predictions of energy shortage, to close "their" portions of the interstate grid to transmissions other than for the in-state utilities that provide electricity to their citizens, attempting in this way to reserve "their" electricity to themselves. *See, e.g., Davis Wants State Government to Play Larger Role in Resolving Utility Crisis*, The Wall Street Journal, Jan. 9, 2001, at A3.

(d) The discrimination resulting from exempting transmissions for bundled retail sales also extends to access to vitally important information about the scheduling and

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[27] In *Northern States Power*, FERC took the position that even though it did not believe it had jurisdiction over interstate transmissions for bundled retail sales, it could bar transmission-owning utilities from discriminating in favor of such transmissions and against the transmissions for wholesale or unbundled retail sales over which FERC concedes it has jurisdiction. The Eighth Circuit rejected this contention, 176 F.3d at 1095-96, and FERC did not seek this Court's review. Enron, which had intervened in the case, did petition for a writ of certiorari, but FERC and the utility largely resolved their differences in the particular case, and FERC opposed certiorari, which was denied. 528 U.S. 1182 (2000), No. 99-916.

status of the transmission system. The exemption effectively allows vertically integrated utilities exclusive access to important information about the use and availability of their facilities. *See Open Access Same-Time Information System (Formerly Real-Time Information Networks) and Standards of Conduct*, Order No. 889, [1991-1996 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,035, at 31,585, 31,585-90, 61 Fed. Reg. 21,737, 21,738-40 (1996). This gives them a competitive advantage in planning for and taking advantage of market conditions.

These examples demonstrate that without applying the OATT to all interstate transmissions, including the 60% of pertinent transmissions that are for bundled retail sales, *see supra* note 4, FERC cannot eliminate the undue discrimination it found. In other words, FERC's "not . . . necessary" finding was unsupported and wrong, and cannot excuse FERC's failure to satisfy its mandate under section 206.

2. *The D.C. Circuit Erred in Sustaining FERC's Jurisdictional Defense of Its Failure To Eliminate the Undue Discrimination That It Found.*

On rehearing, in Order No. 888-A, FERC justified its failure to eliminate undue discrimination involving transmissions for bundled retail sales by asserting that it lacks "jurisdiction" over such transmissions. Pet. App. 453a-456a. On petition for review, the D.C. Circuit sustained FERC's declination solely on the jurisdictional ground. The court ruled that FERC's categorization of interstate transmission for bundled retail sales as part of the retail sale, rather than as interstate transmission, was a "permissible policy choice."

This was error. As Enron showed in Part I, no "choice" was needed or called for. FERC's action simply ignores the plain meaning of the statute. An interstate transmission does

not change character, or cease to be within FERC's jurisdiction under the language of the statute, merely because its cost is bundled as an accounting and invoicing matter with the charge for energy and/or delivery in a retail sale. Moreover, there is no reason why FERC cannot or should not regulate the terms of such interstate transmissions, just as it regulates the terms of wholesale transmissions. In either case, the FERC-regulated terms eventually become a component of a state-regulated retail sale, but this means only that states, in accordance with long-established principles, must take FERC's determinations as to matters within its jurisdiction into account when they regulate retail sales.

The most important point is that *only* FERC can eliminate the undue discrimination FERC found in the provision of interstate transmission services. Individual states cannot do this in their regulation of retail sales. Only FERC can require the owners of interstate transmission facilities to serve others on terms as favorable as the terms on which they serve themselves. Only FERC can regulate the operation of the interstate grid in a way that assures open and fair competition, leading to the provision of electricity with the greatest possible reliability at the lowest possible cost in every region. FERC's erroneous interpretation of the statute prevents it from doing so.

CONCLUSION

The decision of the court of appeals sustaining FERC's abdication of jurisdiction over interstate electric transmission for bundled retail sales should be reversed.

Respectfully submitted,

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